

FRANK GONZALEZ

MOSE DRY DOCK & REPAIR COMPANY,

Respondent.

BUHL OF ALBANY

Attala, et al.,
for Appellant.

I N D E X

| | PAGE |
|--|------|
| Atlantic Transport Co. vs. Imbrokek, 234 U. S., 52. | 5 |
| Cope vs. Vallette Dry Dock Co., 119 U. S., 625. | 3 |
| Gordon vs. Gilfoil, 99 U. S., 168. | 7 |
| Insurance Co. vs. Brunes' Assignee, 96 U. S., 588. | 8 |
| Onedia County Bank vs. Bonney, 101 New York, 173. | 7 |
| Peyroux vs. Howard, 7 Pet., 324. | 7 |
| Stanton et al. vs. Embrey Administrators, 93 U. S., 548. | 7-8 |
| The Jefferson, 215 U. S., 130. | 7 |
| The Robert W. Parsons, 191 U. S., 17. | 7 |
| The Warfield, 120 Fed., 847. | 3 |

IN THE
United States Supreme Court

OCTOBER TERM—1921.

No. 418.

FRANK GONSALVES,

Appellant,

against

MORSE DRY DOCK & REPAIR Co.,
Respondent.

**BRIEF FOR LIBELLANT-
APPELLANT**

Statement

This is an appeal from the District Court of the United States for the Eastern District of New York, in Admiralty, dismissing appellant's libel upon the ground that the Court was without jurisdiction in the matter.

The libel was to recover damages for personal injuries suffered by the appellant while in the employ of the respondent company, and engaged in work as shipfitter on board the steamship "Starmount" in riveting her shell plates; the steamship then lying in the floating dry dock of the Shewan Company, at Brooklyn, N. Y. Upon the opening of the trial, the respondent moved to dismiss the libel upon the ground that the

District Court, sitting in Admiralty, had no jurisdiction over this action. After hearing argument, the Court found, as a matter of law, that the Court had no jurisdiction over the action, and therefore dismissed the libel. *During the argument*, something was said concerning a former suit at law, which had been attempted to be begun in the Supreme Court of the State of New York, but which had been thrown out of that court upon the ground of defective service of process; and an appeal from the order holding that the service of process in the State Court was defective and the action not properly begun, having been taken to the Appellate Division of the Supreme Court, but which appeal was never perfected and never brought on for argument, and which had, in effect, been abandoned, though never formally disposed of. The District Court in passing upon the motion to dismiss for want of jurisdiction, also stated that upon a stipulation on behalf of the appellant that an appeal was taken in March, 1920, from the order of Mr. Justice Finch (of the New York Supreme Court), of February 15th, 1920, in the action referred to in the 10th paragraph of the libel (this order being the one setting aside the service of process in the State Court) and that said appeal never had been perfected beyond the mere taking of the appeal, that he believed the motion to dismiss for lack of jurisdiction should be granted, on that ground also. The sole question, therefore, presented upon this appeal is, "Did the United States District Court for the Eastern District of New York, sitting in Admiralty, have jurisdiction of this cause of action as set forth in the libel?"

Appellant contends that it did, and urges in support of his contention.

POINT I

The cause of action set forth in the libel was that of a maritime tort, cognizable in admiralty and over which the Court had jurisdiction.

The exception to the libel, was made and sustained by the Court, on the ground, that because the ship was in a *floating drydock*, she *was not on or in navigable waters*, and that, therefore, under the decision of this Court, in *Cope vs. Vallette Dry Dock Co.* (119 U. S., 625), and the decision of the District Court for the Eastern District of New York in the "Warfield," (120 Fed., 847), *there was no maritime tort*, and the Court was without jurisdiction.

It was, and is contended by appellant that in deciding the *Cope* case (*supra*), this Court was passing solely upon a salvage question and that the decision in that case did not go to the extent claimed for it in the decision in the "Warfield" (*supra*), which was based on the *Cope* decision, or in the argument by respondent before, and the decision of, the District Judge in the instant case.

As counsel reads and understands the *Cope* decision, it means, that a floating or marine dry dock, being permanently moved and not designed for navigation, could not be the subject of salvage, and the decision does not go beyond that. It is true, that reference was made in the opinion, to the fact, that the dock, was attached to the shore, had no motive power and was not used for the carrying on of commerce in the sense of the carriage of either cargo, or passengers, but these were only set forth as reasons for the holding of

the Court that the *floating dock itself*—as *so fastened* could not be the subject of salvage. On the other hand, this Court, in the case of the "Jefferson" (215 U. S., 130, 30 Sup. Ct., 58, 54 L. Ed., 125), held that a *ship while in dry dock* undergoing repairs was subject to admiralty jurisdiction and liable for salvage service.

Appellant contends that in the case at bar, the ship being in the *floating* dry dock, undergoing repairs to her shell plates, which could not be made while she was in the water, was subject to the jurisdiction of a Court of Admiralty, and that this accident, having occurred *on board* of the ship, under those circumstances, and while libellant was engaged in that very work of repair, that the accident became, and was one over, and to which the jurisdiction of admiralty applied.

The *actual place* of the accident was *on the ship*, and while it is true, the ship *herself* was not afloat in navigable waters, nevertheless, the *dock*, in and to which she was fastened, *was afloat* in navigable waters. It is true, the dock was permanently moored, but the ship, while in that dock, was not on land. The dock *in which she rested* was water borne and it may be said, fairly, the ship was in or on navigable waters.

It is appellant's contention that under these circumstances, if the accident had been caused by the negligence of the ship, it would clearly have been a maritime tort; one which would be subject to the jurisdiction of the Admiralty Court, and that if this be correct, then the mere fact, that it was the negligence of *a third person making the repairs, on board the ship herself*—which actually caused this accident, would not be sufficient to deprive the Court of that jurisdiction.

While the ship, was not actually *in* the water, in the sense that her hull was actually in contact with the water, it is our contention that she was *on* navigable waters within the meaning of this Court, when it stated in *Atlantic Transport Co. vs. Imbrokek* (234 U. S., 52):

“To constitute a maritime tort, it is not indispensable that there must be either an injury to a boat, or an injury by the negligence of a boat, or her owners or mariners. A Court of Admiralty has jurisdiction when the negligent act or omission, wherever done or suffered, takes effect and produces injuries to the person or property of another on navigable waters.”

The ship herself, was a maritime subject, within the admiralty jurisdiction, even while in the dock, for as was said by this Court, in the “Jefferson”, 215 U. S., at page 142 (30 Sup. Ct., 58, 54 L. Ed., 125, 17 Am. Cases, 907):

“In reason we think it cannot be held that a ship or vessel employed in navigation and commerce is any the less a maritime subject, within the admiralty jurisdiction, when for the purpose of making necessary repairs to fit her for continuance in navigation, she is placed in a dry dock and the water removed from about her, than would be such a vessel, if fastened to a wharf in a dry harbor, where by the natural recession of the water by the ebbing of the tide, she, for a time, might be upon dry land.”

If the “Starmount”, though in the dock, had still been afloat, not yet lifted out of the water, and this accident had then occurred, it could hardly be claimed that admiralty would not have jurisdiction of the tort, exactly as if it happened while she was fast to a wharf, afloat on the flood

tide. As the tide ebbs, and the ship begins to rest on the bottom, or as in the instant case, the chambers of the dock are emptied, and the dock begins to rise, and to lift the ship out of the water, does Admiralty begin to lose jurisdiction, so that, at the moment she rests entirely on the bottom, with the water gone from around her hull, or in the instant case, the ship is lifted clear of the water, it is entirely gone, only to come into existence again as the waters of the flood tide begin to lap her hull or as the dock begins to sink, and the water to touch the ship, again?

In other words, would an accident happening, while she was still afloat be a maritime tort, and not be one, at the moment, the water ceased to surround her, and again become one, the moment the water began again to surround the hull?

It is submitted, that though locality is the test as to whether a tort is, or is not a maritime one, that here the locality was on a ship, *on navigable waters*, and the tort was a maritime one, of which the Admiralty Court had jurisdiction. The libellant, *was not on land* when he was injured; he was on the ship. Neither was the ship on land, she was in a dock, *which was afloat in navigable waters, water borne*, although fastened to the shore in such a manner that it could only move up and down, in the water, unless the supports were loosened, or removed, and, therefore, for all practical purposes *the ship herself*, though not actually *water borne* at the time of the accident *was on navigable waters*.

The services, which were being rendered by libellant at the time his injury was received, were maritime.

Peyroux vs. Howard, 7 Pet., 324.

The Robert W. Parsons, 191 U. S., 17.

The Jefferson (supra).

They were being performed on board a ship upon navigable waters, and the injury falls within the jurisdiction of admiralty.

POINT II

There was no plea by respondent, in abatement, because of the pendency of any action or proceeding in the state court, and none could be made on that ground.

No reference to any pending appeal in the State Courts will be found in either the libel or the answer. It was only during the argument on the motion to dismiss on the ground of laches, that the statement was made by the advocate for respondent, that an appeal had been taken, and never prosecuted or determined. The mere pendency of another action for the same cause and between the same parties in the State Court, however, could not deprive the District Court of jurisdiction, either in admiralty or at common law:

“It is well settled that pendency of another action for the same cause in the United States Courts is not available as a defense, in the State Courts, or *vice versa*.”

Oneida County Bank vs. Bonney, 101 N. Y., 173.

Stanton vs. Embrey, 93 U. S., 548, 23 L. Ed., 983.

Gordon vs. Gilfoil, 99 U. S., 168, 25 L. Ed., 383.

The pendency of a prior suit in a State Court is not a bar to a suit in a Federal Court by the plaintiff against the same defendant for the same cause of action.

Stanton et al. vs. Embrey Administrators, 93 U. S., 548, 23 L. Ed., 983.
Insurance Co. vs. Brunes' Assignee, 96 U. S., 588.

There was, therefore, no bar to the jurisdiction of the Admiralty Court, over this action, because of the pendency of any prior action or appeal in the State Court, and this even if such plea had been made in its answer by respondents, which, however, was not done.

The only question, therefore, which is involved in this appeal is, whether or not, the tort complained of in the libel, was of such a maritime nature, that the Admiralty Court should have assumed jurisdiction and heard libellant's proofs.

Appellant respectfully submits, that the Admiralty Court did have jurisdiction over the cause and should have exercised it, and prays that his appeal herein be sustained, with costs, and the case remanded to the District Court for the Eastern District of New York, for trial on the merits.

Respectfully submitted,

ROBERT STEWART,
Proctor for Libellant-Appellant,
Frank Gonsalves,
150 Nassau Street,
City of New York,
State of New York.